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No. 95-1225

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The essential premise of respondents' argument in this case is fundamentally flawed. Respondents contend that, because the historical tax refund action against the Collector shared similarities with the common law action for "money had and received," suits against the Collector "were as amenable to equitable tolling as any common law action against a

private party" (Resp. Br. 12). Respondents then theorize that, when the action against the Collector was displaced by the refund suit that Congress authorized directly against the United States, there was no "intent * * * to abridge the amenability of such suits to equitable tolling" (*ibid.*).

These contentions lack any support in the case law. They are also historically inaccurate, logically flawed and divorced from the text of the statutory provisions that govern the timely filing of tax refund suits.

(a) No case has been cited by respondents—and none can be cited—for the proposition that the statutory limitations on the action formerly permitted against the Collector were subject to equitable tolling.[1] In particular, no case held that "equitable" grounds may make compliance with these statutory requirements unnecessary. Instead, both in suits against the Collector and in suits directly against the United States, the established rule has been that (*Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205-206 (1886) (emphasis added)):

> no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. *It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him.*

[1] The decision of the court below—which conflicts with all other appellate decisions on the question presented in this case—offers no support for the novel theory that respondents now advance. The court of appeals held (Pet. App. 4a-5a) that this Court's 1990 decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, required the conclusion that a "rebuttable presumption" of equitable tolling applies to tax refund suits. The court stated that it found no evidence in the language or history of Section 6511 (26 U.S.C.) to rebut the presumption of equitable tolling under *Irwin* (Pet. App. 5a-6a). The analysis and conclusion of the court of appeals are incorrect for the reasons described in detail in our opening brief (Pet. Br. 15-41).

Recognizing that it is essential to the "orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted," this Court explained in *Cheatham* v. *United States*, 92 U.S. 85, 89 (1875), that the statutory requirement of a timely refund claim represents "a condition on which alone the government consents to litigate the lawfulness of the original tax." *Ibid.* The Court held that this limitation upon the government's consent to suit was not subject to judicial modification, stating that "[i]f there existed in the courts * * * any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." *Ibid.* Accord, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 130-131 (1868).

Contrary to respondents' unsupported assertion, the courts have long and uniformly concluded that "principles of equity may not override statutory requirements for timely filing of tax refund claims." *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966). Indeed, prior to the decision in the present case, the courts of appeals had unanimously held that strict compliance with the statutory limitations on tax refund claims is required and that equitable tolling has no application to tax refund suits. See, *e.g.*, Pet. Br. 21-22 (citing cases); *Williams* v. *United States*, 228 F.2d 129, 132 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956); *Young* v. *United States*, 203 F.2d 686, 689 (8th Cir. 1953); *Bryan* v. *United States*, 99 F.2d 549, 551 (10th Cir. 1938), cert. denied, 305 U.S. 661 (1939). See also *Kaltreider Construction, Inc.* v. *United States*, 303 F.2d 366, 368-369 (3d Cir.), cert. denied, 371 U.S. 877 (1962); *Aplington* v. *United States*, 169 F. Supp. 815 (Ct. Cl.), cert. denied, 361 U.S. 821 (1959). This settled understanding was correctly summarized in *Stepka* v. *United States*, 196 F. Supp. 184 (E.D.N.Y. 1961), when the court stated that "[t]he limitation of time provided for [the commencement of a tax refund suit] is inflexible" and may not be equitably tolled by "the inability to commence the action by reason of mental incompetency." *Id.* at 185. Respondents' unsupported assertion that tax refund suits against the Collector were subject to equitable tolling "at least until 1966" (Resp. Br. 12) is demonstrably incorrect.

(b) Respondents also err in contending (Resp. Br. 7-8) that the suit that was historically permitted against the Collector was simply a common law action that was inherently subject to equitable modification. From 1845, when the first statute authorizing suits

against the Collector was enacted, until 1966, when such suits were expressly barred by Section 7422(f), the refund suit against the Collector was a creature of statute, not of common law. As this Court stated in *Flora* v. *United States*, 362 U.S. 145, 153 (1960), quoting *Curtis's Aministratrix* v. *Fiedler*, 67 U.S. (2 Black) 461, 479 (1863):

> [W]e are not satisfied that the suit against the Collector was identical to the common-law action of assumpsit for money had and received. * * * [After the Act of 1845 authorized the suit against the Collector,] the Court no longer regarded the suit as a common-law action but rather as a statutory remedy which "in its nature [was] a remedy against the Government."

See also Pet. Br. 16-17 n.7.[2] As a statutory remedy, any recovery against the Collector was "subject to

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[2] The action against the Collector originated before the United States consented to suit in tax refund cases. See *George Moore Ice Cream Co.* v. *Rose, Collector of Internal Revenue*, 289 U.S. 373, 382 (1933). When Congress required the Collector to remit tax payments to the Treasury regardless of a taxpayer's protest, the Court held that the Collector was also immune from suit and that the common law action against the Collector was no longer available. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845). Congress thereafter authorized a statutory recovery against the Collector, and the suit proceeded under the statute, not under common law. See *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 299 (1946) (the suit against the Collector is based upon "statutory warrant").

Beginning with the Tucker Act in 1887, Congress enacted a series of statutes that have authorized suits for tax refunds directly against the United States. See Pet. Br. 18 & n.9. By 1933, although the suit against the Collector still existed, it was "an anomalous relic of bygone modes of thought," and the presence of the Collector as a defendant was "merely a remedial

such restrictions as Congress might provide." William T. Plumb, Jr., *Tax Refund Suits Against Collectors of Internal Revenue*, 69 Harv. L. Rev. 685, 690-691 (1947). In all of the statutes enacted since 1845 to authorize tax refund suits, it has been "required, in one form or another, that a written protest or claim for refund be filed with the Treasury before the collector could be sued." *Id.* at 691 n. 32. See also Pet. Br. 16-18.

As this Court explained in *Rothensies* v. *Electric Battery Co.*, 329 U.S. 296 (1946), the limitations that Congress enacted upon suits against the Collector were not subject to judicial modification on equitable grounds of "fairness." *Id.* at 301. As the Court further noted in *Rothensies*, this conclusion was made manifest by (what is now) Section 6514 of the Code, which specifies that a tax refund is "erroneous" and "void" if the express and detailed statutory requirements for timely refund claims have not been met. 329 U.S. at 299 n.1. See also Pet. Br. 32. Both with respect to suits against the Collector and suits directly against the United States, courts have consistently required strict compliance with the statute of limitations for the filing of refund claims.[3] See, *e.g.*, *Kings County Savings Institution* v. *Blair*, 116 U.S. at 204; *Cheatham* v. *United States*, 92 U.S. at 89;

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expedient for bringing the Government into court." *George Moore Ice Cream Co., Inc.* v. *Rose, Collector of Internal Revenue*, 289 U.S. at 382-383. See also *Flora* v. *United States*, 362 U.S. at 151-152.

[3] Indeed, it was in a case rejecting an untimely tax refund claim that Justice Holmes stated for the Court that "[m]en must turn square corners when they deal with the Government." *Rock Island, Ark. & La. R.R.* v. *United States*, 254 U.S. 141, 143 (1920).

Nichols v. *United States*, 74 U.S. (7 Wall.) at 131; *Toledo Edison Co.* v. *McMaken, Collector of Internal Revenue*, 103 F.2d 72, 75-76 (6th Cir.), cert. denied, 308 U.S. 569 (1939).

(c) Respondents err in suggesting (Resp. Br. 12) that the provisions of the Internal Revenue Code that authorize suits directly against the United States reveal no intent to require strict compliance with the statutory time limitations on refund claims. In making that contention, respondents wholly ignore Section 6514 of the Code, which specifies that a refund or credit made on a claim filed outside the express statutory periods of limitation must be considered "erroneous" and "void." 26 U.S.C. 6514(a). See *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 299 n.1.

For the reasons described in detail in our opening brief (Pet. Br. 18-20), the structure of the Internal Revenue Code compels the conclusion that the time requirements for refund claims are strict in their application. Congress has specified that a suit may not be "maintained in any court for the recovery of any internal revenue tax" unless a refund claim "has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The applicable provisions of law establish specific and detailed time limitations upon refund claims (Section 6511(a)) and further specify that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed * * * unless a claim for credit or refund is filed by the taxpayer *within such period*" (26 U.S.C. 6511(b)(1) (emphasis added)). Congress reinforced these limitations on refunds by further specifying that, if a refund claim is filed *after* the expiration of the specific statutory periods of limitation, any refund or credit given on such a claim

is "erroneous" and to be considered "void" (26 U.S.C. 6514(a)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress limited "the amount of the credit or refund" to the "portion of the tax paid within" those express statutory periods—and thereby again precluded any recovery on untimely claims. See 26 U.S.C. 6511(b)(2)(A)-(C); Pet. Br. 32-34.

These provisions manifest the plain intent of Congress that the statutory limitations on refund claims are to be strictly enforced and that any recovery upon claims that are not filed within the specific statutory periods is prohibited. No other intent can plausibly be ascribed to them. As the First Circuit held in *Oropallo* v. *United States*, 994 F.2d 25, 30-31 (1st Cir. 1993), cert. denied, 510 U.S. 1050 (1994), and as we explain in our opening brief (Pet. Br. 27-38), these precise, detailed and interlocking limitations on tax refund claims in Section 6511(a), Section 6511(b) and Section 6514 of the Code are fundamentally inconsistent with any application of the doctrine of equitable tolling.[4]

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[4] Respondents correctly note (Resp. Br. 19) that in *Oropallo* the First Circuit assumed (without deciding) that a return filed after it was due would constitute a "'return' which triggers application of the three-year limitations period" in Section 6511(a). 994 F.2d at 27. This Court made that same assumption, without deciding that issue, in its recent decision in *Commissioner* v. *Lundy*, 116 S. Ct. 647, 656 (1996). In *Lundy*, the Court noted that the Ninth Circuit has expressed a contrary view. *Ibid.*, citing *Miller* v. *United States*, 38 F.3d 473, 475 (1994).

In this case, as in *Lundy*, there is no need to resolve that question of interpretation of Section 6511(a), for neither of respondents filed a return within three years of the date that the taxes were paid. As the court stated in *Oropallo*, that question

2. Respondents err in contending (Resp. Br. 13-22) that the statutory limits on the "amount" of any refund established by Section 6511(b) are subject to equitable tolling. Statutes that define substantive limitations on recoveries are not subject to equitable modification. See Pet. Br. 34-35 (citing cases). That principle has particular significance for monetary claims against the United States, for only Congress may determine the conditions upon which the United States consents to be sued.

(a) Section 6511(b)(1) specifies that "[n]o credit or refund" is to be allowed unless a claim for refund is filed by the taxpayer within "the period of limitation *prescribed in subsection (a) for the filing of a claim for credit or refund*" (26 U.S.C. 6511(b)(1) (emphasis added)). In turn, Section 6511(a) specifies that a claim for refund must be filed within "3 years from the time the return was filed or 2 years from the time the tax was paid" (26 U.S.C. 6511(a)). A claim that is filed more than "3 years from the time the return was filed or 2 years from the time the tax was paid" is thus not filed within the period that is "prescribed" by that statute. "No credit or refund" on such a claim is therefore permitted under the precise text of Section 6511(b)(1). See, *e.g.*, *Amoco Production Co.* v. *Newton Sheep Co.*, 85 F.3d 1464, 1471 (10th Cir. 1996).

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of interpretation of Section 6511(a) has no bearing on the question whether equitable tolling of this statute of limitations is permitted (994 F. 2d at 27), for the provisions of Section 6511(b) establish a substantive period of repose that is fundamentally inconsistent with equitable tolling. 994 F.2d at 30-31. Under the analysis of this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the court concluded that the "rebuttable presumption" of equitable tolling has been rebutted. See Pet. Br. 35-38.

(b) Section 6511(b)(2) provides detailed substantive limitations on the "amount" of any refund claim. Under Section 6511(b)(2)(A), if the taxpayer files a refund claim within "the 3-year period prescribed in subsection (a)"—that is, "within 3 years from the time the return was filed" (26 U.S.C. 6511(a))—"the amount of the credit or refund shall not exceed the portion of the tax paid within" three years prior to the filing of the claim (26 U.S.C. 6511(b)(2)(A)).[5] If the claim is not filed within three years of the return, Section 6511(b)(2)(B) then limits the "amount" of the recovery to "the portion of the tax paid during the 2 years immediately preceding the filing of the [refund] claim." 26 U.S.C. 6511(b)(2)(B).

Respondents contend (Resp. Br. 13-22) that these limits on the "amount" of refunds established in Section 6511(b)(2) do not mean what they say. Relying upon excerpts from the legislative histories of this provision, respondents contend that the statute seeks only to make the time for filing a refund claim "coextensive" with the time that the government has for making a tax assessment (Resp. Br. 18). The provisions of Section 6511(b)(2) that limit the "amount" that may be recovered on refund claims, however, contain no reference to the separate provisions that determine the period in which the government may assess the tax. Moreover, the statutes that determine the period for assessment (26 U.S.C. 6501-6504) do not refer in any manner to the refund claim provisions of Section 6511. The statutory limitations on assessment are thus "wholly irrelevant" to the interpretation and application of the separate statutory limitations on claims for refund. *Ancel* v. *United States*, 398 F.2d 456, 458-459 (7th Cir. 1968).[6]

[5] The amount of recovery may include payments made during any additional time permitted by a timely "extension of time for filing the return" (26 U.S.C. 6511(b)(2)(A)).

Respondents nonetheless maintain that nothing in the legislative history supports the conclusion that Section 6511(b)(2) is designed to prevent taxpayers from asserting "stale claims" (Resp. Br. 20). The very portion of the history on which they rely, however, states that the statute prevents a taxpayer from "reopen[ing]" a tax year by making a small payment after the statute of limitations has expired (*id.* at 16 & n.9). As the plain text of the statute reflects, it also prevents a taxpayer (such as respondents) from "reopen[ing]" a tax year by filing a return and refund claim more than three years after the tax is paid. 26 U.S.C. 6511(b)(2)(A) and (B).[7] The obvious purpose of

[6] Any suggestion that the statutory period for assessment should be linked with the period for timely refund claims would require a substantial restructuring of the text of these provisions. Respondents propose, as a solution to this textual problem, that, if equitable tolling applies to a taxpayer's refund claim, then "the period the Commissioner has to assess a tax * * * should be tolled to the same extent" (Resp. Br. 22). But that sort of unfettered disregard for express statutory text has never been sanctioned by this Court, and respondents do not suggest that any decision of any court could be cited as authority for their proposition. Instead, as this Court recently observed, a contention that the statutory limitations on tax refund claims could be "improve[d]" by amendment is one that must be addressed to Congress, not to the courts. *Commissioner* v. *Lundy*, 116 S. Ct. 647, 657 (1996), quoting *Badaracco* v. *Commissioner*, 464 U.S. 386, 398 (1984).

[7] The fact that the extract from the legislative history that respondents cite provides only one example of how "stale claims" are barred by the plain text of this provision does not "restrict the meaning of the statutory phrase * * * precisely

the statute is precisely to bar the assertion of "stale claims" by preventing taxpayers from obtaining any refund of payments made (i) more than three years before the refund claim if a return was filed or (ii) more than two years before the claim if a return was not filed. *Ibid.* See Pet. Br. 32-35.

As the court concluded in *Webb* v. *United States*, 66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360, the statute in this manner establishes a "substantive right" to be free from liability after the expressly defined periods for the filing of timely refund claims have expired. 66 F.3d at 700. Such substantive limitations on claims against the government are not subject to equitable tolling. *Ibid.* Because the taxes involved in this case were paid by respondents more than three years before their claims for refund were filed, no "portion of the tax" may be refunded under the express mandate of Sections 6511(b)(2)(A) and (B). Thus, even apart from the limitations period imposed by Section 6511(a), respondents therefore cannot prevail in this case as a matter of substantive law. *Amoco Production Co.* v. *Newton Sheep Co.*, 85 F.3d at 1472.

3. Both in financial magnitude and in the number of transactions, the internal revenue process dwarfs most other economic activities within the United States. Hundreds of billions of dollars and hundreds of millions of tax returns are processed each year. Under the three-year statute of limitations established by Section 6511(a), approximately half a billion returns remain subject to challenge at any single time. See Pet. Br. 25 & n.16. If that three-year period

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to the illustration selected" (*United States* v. *National City Lines*, 337 U.S. 78, 81 (1949)).

were not effective as a limitation on refund claims, and if the government were required to remain ready to address challenges to taxes paid over periods of undefined duration, it is not an exaggeration to say that billions of returns would remain subject to potential litigation.

Recognizing the enormity of the scale of the internal revenue process, this Court stated in *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 301:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest.

Noting that a uniform statute of limitations for tax refund claims is of critical importance as a matter "of fairness as well as of practical administration of an income tax policy," *ibid.*, the Court stated: "If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them." *Id.* at 303.

Congress, of course, has authority to make statutory adjustments to address inequities in the refund process—an authority that it has excercised in several narrow contexts. See Pet. Br. 23-24. Congress also retains authority to address particular inequities in individual cases through the process of private legislation. *Id.* at 27. This Court has consistently and correctly concluded, however, that, although the statutes of limitations may cause "[b]oth hardships to the taxpayers and losses to the reve-

nues," Congress has not authorized "the equity-minded judge to seek for ways of relief in individual cases." *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 302.

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For the foregoing reasons and the reasons set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

SEPTEMBER 1996